

1 I. INTRODUCTION

2 This action arises from the use of brief portions of
3 instrumental works as background music in a handful of one-hour
4 episodes of the long running television series "America's Next
5 Top Model" ("ANTM").

6 Although Plaintiffs have caused much confusion by the manner
7 in which they have identified the musical works they claim were
8 infringed, the basic fact is that all of the instrumental works
9 used in ANTM were duly licensed on a non-exclusive basis by the
10 creator of those works, Jean-Yves Ducornet ("Jeeve") by his duly
11 appointed publishing administrator, PEN Music Group, Inc. ("PEN")
12 Therefore, Plaintiffs' consent was not needed and CBS cannot be
13 liable for copyright infringement.

14 Also, Plaintiff Delary Richardson ("Richardson") refused
15 (objecting on relevance grounds) to provide copies of the deposit
16 copies allegedly filed with his applications for copyright
17 registrations. Accordingly, Richardson's claims can not be
18 proven.

19 Plaintiffs attempt to make much of the (unsupported)
20 allegations that CBS falsified cue sheets and that artists who
21 did not perform on ANTM received royalties instead of Plaintiffs.
22 Putting aside for the moment that these accusations are not true,
23 more importantly, they are wholly irrelevant. Neither of the
24 Plaintiffs has standing to raise these claims.

Finally, Plaintiffs have the burden of establishing that any alleged infringement caused them damages. Plaintiffs cannot do so. Plaintiffs have failed to even attempt to establish any actual damages, either through expert or percipient witnesses.

Moreover, any claim for a portion of CBS's profits would be utterly speculative at best. There is simply no way to calculate what portion of profits (even assuming there are any) would be attributable to a few seconds of background music in a sixty-minute episode which is part of a season-long program.

10 Further, Plaintiffs are not entitled to statutory damages
11 because their copyrights were registered many months (if not
12 years) after the allegedly infringing episodes first aired.

13 CBS's motion should be granted.

14 II. MATERIAL FACTS

15 Plaintiffs claim that CBS has infringed the copyrights in 15
16 musical works (collectively "Plaintiffs' Works"). Richardson
17 produced a compact disc at his deposition that was marked as
18 Exhibit 2 and according to Richardson, contains all 15 of
19 Plaintiffs' Works. Richardson stated that he created the CD only
20 after being asked to produce "deposit copies" he submitted with
21 his applications for registration to the Copyright Office.

22 || Undisputed Fact No. 11.

Richardson claims infringement of 13 of the Plaintiffs' Works (the "Richardson Works") and Plaintiff Sterling A. Snyder ("Snyder") claims infringement of the remaining two of

1 Plaintiffs' Works (the "Snyder Works").

2 All infringements are alleged to have occurred as a result
3 of the use of small portions of the music (without lyrics) of
4 Plaintiffs' Works in a few episodes of ANTM. *Exhibit "A" to*
5 *Complaint.*

6 Plaintiffs do not dispute that the instrumental versions of
7 all 15 of Plaintiffs' Works were originally created by Jeeve and
8 that to the extent that Plaintiffs, or either of them, have valid
9 copyrights in the works, Jeeve is a co-owner of the copyrights.

10 *Undisputed Fact No. 1.*

11 It is also undisputed that at all relevant times PEN Music,
12 Group, Inc. ("PEN") administered Jeeve's catalog of musical works
13 (composition and sound recordings). *Undisputed Fact No. 2.*

14 Pursuant to his administration agreement with PEN, Jeeve
15 delivered each of his musical works to PEN and PEN in turn
16 delivered each of the works to Anisa Productions, Inc. (or its
17 predecessor), the producer of ANTM, for review. *Undisputed Fact*
18 *No. 3.*

19 To the extent that it desired to use any of the works, PEN
20 licensed them to the producer. *Undisputed Fact No. 4.*

21 Further, Richardson admitted at his deposition that the only
22 possible source of any of the Plaintiffs' Works that appeared in
23 ANTM was PEN. *Undisputed Fact No. 5.* Plaintiffs do not claim
24 that any of Plaintiffs' Works were secured by the ANTM producer
25 from any other source. *Undisputed Fact No. 6.*

1 Ultimately, CBS received the copyrights to all episodes of
2 ANTM, including rights to the music used therein, from the
3 producer. *Undisputed Fact No. 7.*

4 Plaintiffs' accusations of "falsified cue sheets" and "other
5 artists . . . receiving unauthorized royalties for musical
6 compositions not actually aired by [CBS]. . . ." (Complaint,
7 ¶29) are irrelevant. However, Plaintiffs have caused much
8 confusion by the manner in which they secured the copyrights
9 (long after any alleged infringement) upon which they are suing.

10 As noted, there is no dispute that Jeeve created the
11 instrumental version of all of Plaintiffs' Works and that he
12 delivered them to Richardson without titles and with the idea
13 that additional material would be added. *Undisputed Fact No. 8.*

14 Richardson then assigned random titles to the Richardson
15 Works without Jeeve's knowledge. *Undisputed Fact No. 9.*

16 Therefore, when PEN licensed the works, it did not do so
17 under the titles arbitrarily assigned by Richardson. *Undisputed*
18 *Fact No. 10.*

19 Richardson now attempts to use the fact that the titles he
20 assigned the works differ from those appearing on the cue sheets¹
21 to create confusion and to use as the basis for a copyright
22 infringement claim.

23
24 ¹ A "cue sheet," in this instance, refers to a document
25 which lists all of the music that was used as part of an episode
26 of ANTM and that is provided to public performance societies such
27 as ASCAP and BMI. These organizations in turn pay the
28 appropriate royalties to the registered songwriters.

1 Nonetheless, titles aside, Plaintiffs' claims are invalid
2 for the following reasons:

3 1. Plaintiffs concede that Jeeve is the co-owner of the
4 copyright in all of Plaintiffs' Works. As such, Jeeve authorized
5 his publishing administrator to grant non-exclusive licenses to
6 the producer of ANTM. These non-exclusive licenses bar any claim
7 for copyright infringement.

8 2. Richardson cannot establish valid copyrights in the 13
9 Richardson Works because he has refused to produce any of the
10 deposit copies he filed with his copyright registration
11 applications. *Undisputed Fact No. 11.* Moreover, he has admitted
12 that whatever he filed did not contain any identification by
13 title of the 11 individual tracks that were supposedly included
14 in the "Del Funk Boy Music and Paperwork Production tracks
15 library." *Undisputed Fact No. 12.*

16 3. The two Snyder Works, for which the copyright
17 registration was effective October 3, 2011, on behalf of non-
18 party "Zion Pick" were not the works used in ANTM. *Undisputed*
19 *Fact No. 16.* What was licensed and used were the instrumental
20 versions created by Jeeve and provided to PEN *before* the Zion
21 Pick versions were created. Snyder can establish no right to
22 pursue a copyright infringement claim on behalf of Jeeve's prior
23 works.

24 4. Even if Plaintiffs could overcome the above
25 deficiencies, Plaintiffs cannot establish any actual damages or